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business of the dealers, and in the relation which they would naturally bear to the manufacturer.

In all such cases the question whether the dealers are agents, or whether they purchase and sell for their own account, will be determined from the surrounding circumstances, and the court will be keen to ascertain whether subterfuge is being practiced to evade public policy as expressed in the law.

In the cases above cited, this court found that the purpose of the system of contracts, claimed to be contracts of agency, was to accomplish the prohibited lessening of competition by the creation, in form, of the relation of principal and agent, but where the surrounding circumstances disclosed that no such relation actually existed.

In the instant case circumstances are presented which point unmistakably to the conclusion that the making of the second contract was but a subterfuge resorted to by the respondent to accomplish the same restraint upon the competition of competitors effected by the original system of contracts. The first contracts were unquestionably contracts of sale. When it became apparent that the use of these contracts constituted a violation of law because of their effect to substantially lessen competition, respondent sought to retain the benefits theretofore enjoyed and effectually to exclude its competitors from selling to wholesale dealers by ingeniously devised changes in the form of the contract, which it now claims constitutes the dealers the respondent's

Contracts

TOO
LARGE
FOR
FILMING

Contract held to be contract of sale in Boston Store v. American Graphophone Co., 246 U. S. 8.

agents, with the consequent legal right in the respondent to control their actions and their relation to other publishers. But it is submitted that the law may not be so readily evaded and set at naught. This court will look through the form to the substance of the transactions, and vindicate the public policy declared in the statute.

II.

If respondent sells its publications to the dealers, the existence of an agency contract does not take its conduct out of the operation of section 3 of the Clayton Act.

Respondent apparently urges that even if its publications are sold to the dealers, yet its contract is one of agency. To this we reply, that if the publications are sold upon the prohibited condition, and with the prohibited effect, the law is violated regardless of the fact that dealers may for some purpose be the agents of the respondent. Section 3 of the Clayton Act applies to sales and contracts for sale, upon the condition that the vendee shall not deal in the goods of a competitor or competitors. The second count of the amended complaint charges sales and contracts for sale. If, therefore, the original contract was one of sale, or if respondent's publications are sold to the wholesale dealers under the new contract, the fact that the new contract may constitute the dealers the agents of the respondent for certain purposes does not take its sales upon the prohibited condition out of the operation of section 3 of the Clayton

Act. A contract may provide for sales and at the same time constitute the vendee an agent for limited purposes.

III.

The finding by the commission that the contracts are contracts of sale is entitled to weight.

The Federal Trade Commission is an administrative and quasi-judicial body, charged, among other things, with the enforcement of section 3 of the Clayton Act and section 5 of the Federal Trade Commission Act.

It is authorized and commanded to prevent violations of those sections. Its duties are primarily administrative. In their performance it must necessarily decide questions of fact as well as mixed questions of law and fact, sometimes called conclusions of law. Its decisions on such questions are entitled to the weight which this court uniformly accords to such a finding or conclusion made by an administrative body or executive officer in the execution and enforcement of law. It is well established that a finding of this character will not be upset unless clearly erroneous. In the instant case the commission found, after full hearing of the facts, that the contracts were contracts of sale, and its findings should be sustained unless manifestly incorrect.

IV.

Respondent's contracts provide that no other magazines or periodicals may be wholesaled without its consent.

Respondent insists in his brief (pp. 17, 21) that it has never declined to permit a wholesale dealer to continue handling any publication which he was selling before respondent entered into a contract with him. If this be true, it is a matter of grace at the hands of the respondent. The terms of its contract explicitly provide that the agent "agrees * * * to refrain thereafter from wholesaling, to boys or dealers, any periodicals other than those published by the Curtis Company without first obtaining the approval of the publisher." But even if it has been respondent's policy not to prevent these wholesalers from handling publications previously sold by them, it does not save the contract from illegality. New concerns entering the field have the same right to sell through established wholesale dealers as have already existing companies. Similarly, old publishing houses seeking to introduce new publications are entitled to avail themselves of the existing channels of distribution.

V.

Both forms of contract are in issue.

Respondent contends that only the new form of contract is in issue, and that in fact it is the only form now in use, citing T. 3259. On the contrary,

petitioner insists that the amended complaint is sufficiently broad in its allegations to cover both contracts, and it was intended to cover both. When the amended complaint was filed, only a few of the new form of contract (referred to in petitioner's brief as "second contract") were in use. The complaint was amended to include that contract, but it was intended also to cover, and does cover, the original contract. This is particularly true of that count of the amended complaint charging a violation of section 3 of the Clayton Act.

Nor is it true that the second contract was the only one in use when the testimony was taken. Pages 3260 et seq. of the transcript, immediately following the page cited by respondent, show that the old contract was in use. Other testimony in the record conclusively proves that the old contract was still in use. (T. 1309, 3260.)

In this connection respondent also insists that the complaint is confined to dealers in magazines and periodicals. This contention certainly can not be sustained as against the second count of the amended complaint, which charges a violation of section 3 of the Clayton Act. The allegation is that the respondent is selling, and making contracts for sale of, its publications, on the condition prohibited by the statute and with the unlawful effect condemned by it. No description of the character of the dealers to whom such sales are made is found in this count of the complaint, and none was necessary.

VI.

The character and extent of the business of the wholesalers covered by the commission's finding is sufficiently proven.

The respondent contends at length in its brief (pp. 15, 56) that the commission has not proven the location or volume of the business of the wholesalers covered by its findings, or whether there were other wholesalers in their communities. The commission called approximately 55 wholesale dealers in newspapers or magazines, or both, as witnesses, who were at the time, or had been, purchasing respondent's publications, and fully developed the nature and extent of their business, its volume, and the conditions existing in the cities in which they were located in the distribution of newspapers and magazines at wholesale—whether they were the only wholesaler, if there were others, the extent and character of their business, etc. These witnesses were sufficient to prove the character of the business of the wholesale dealers and the conditions existing in the business. For the commission to have called every one of such dealers in the United States, or to have sent agents to investigate every community, in order to be able to testify respecting the conditions existing, would have unduly and unnecessarily enlarged the record and have multiplied the expense of the proceeding. There is ample evidence to support the finding in this regard.

VII.

The number of newspaper and magazine dealers carrying other newspapers or magazines when beginning to sell respondent's publications is proven.

Respondent, in its brief (pp. 15, 30, 35), asserts that there is an unstated and indefinite number of newspaper wholesalers who were carrying other magazines when they first began to sell the Curtis publications. The evidence is clear respecting the number of dealers carrying newspapers and the number carrying magazines when they first began to sell Curtis publications. It is quoted at pages 27–28 of the petitioner's brief. The commission's finding is a less number than the evidence shows, but is substantially correct.

VIII.

The terms "certain," "many," and "numerous," as used in the findings, are justified.

Respondent criticizes these words as vague and indefinite (respondent's brief, pp. 30 et seq.). In view, however, of the fact that the commission proved a substantial number of specific instances where the wholesale dealers under contract with the respondent were the only wholesalers, and other instances in which such dealer was unquestionably the only substantial dealer with experience, equipment, and facilities in a given community, this finding was justified. The alternative would have been to have called every dealer in the country, or to have investigated conditions in every city, and

upon proving the facts secured have made a finding of a specific number of instances. This, it is submitted, the commission was not called upon to do. Such a course would have resulted in great delay and extraordinary expense, and in unnecessarily enlarging the record.

IX.

There is no difference between a wholesale dealer in newspapers and a wholesale dealer in magazines.

The respondent, in its brief, insists at length that there is a difference between wholesale dealers in newspapers and wholesale dealers in magazines and periodicals. On the other hand, petitioner contends that there is no essential difference in the business of such dealers. The business of wholesaling newspapers or magazines is essentially the same. The same sort of equipment and the same methods of distribution are employed, and experience in the distribution of newspapers is valuable in the sale of magazines, and vice versa.

As pointed out in petitioner's brief, some wholesale dealers carry only newspapers, some carry newspapers and magazines, and others carry only magazines. It appears that many dealers who carried only newspapers at one time, now carry magazines also; and it is equally possible that magazine wholesalers may be induced to carry newspapers. The record shows that the respondent induced some 394 wholesale dealers in newspapers to handle its magazines

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In the Supreme Court of the United States.

OCTOBER TERM, 1920.

FEDERAL TRADE COMMISSION, Petitioner,
v.
THE CURTIS PUBLISHING COMPANY, Respondent.
} No. ——.

PETITION OF THE FEDERAL TRADE COMMISSION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF.

The Solicitor General and the Acting Chief Counsel of the Federal Trade Commission, on behalf of the Commission, pray for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Third Circuit in the above entitled cause.

THE QUESTIONS PRESENTED.

1st. Whether or not the contracts of the respondent with its distributors are within the purview of Section 3 of the Clayton Act (38 Stat. 730); that is, are they contracts of sale or contracts of agency; and if contracts of sale, may their effect be to substantially lessen competition with or tend to create a monopoly for the respondent when used by it to prevent dealers from selling the magazines of respondent's competitors *which they had been selling.*

2d. Whether or not it is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act (38 Stat. 717) for the respondent, The Curtis Publishing Company, to make a practice of entering into contracts with wholesale dealers in newspapers or magazines already engaged in the sale or distribution of magazines or newspapers of other publishers, whereby such dealers, hereinafter described, are prevented from thereafter acting as agents for or supplying at wholesale rates, any periodicals other than those published by the respondent; *such dealers being the established and in most instances the principal and most efficient, and in numerous cases, the only mediums for the general distribution or sale of magazines or newspapers of other publishers in the various localities of the United States.*

3d. Whether or not the Court exceeded its jurisdiction in view of Section 5 of the Federal Trade Act which provides that "the findings of the Commission as to the facts, if supported by testimony, shall be conclusive," (1st) by making findings additional to those of the Commission, and (2d) by making findings contradictory to certain of the Commission's findings which it accepted in its opinion as established.

THE FACTS.

The respondent, The Curtis Publishing Company, publisher of the Saturday Evening Post, Ladies' Home Journal, and the Country Gentleman, entered into contracts with persons, partnerships, and corpora-

tions to sell or distribute its magazines, by the terms of which contracts such persons, partnerships, or corporations agreed not to "act as agent for or supply at wholesale rates any periodicals other than those published by the publisher." At the time the Commission's complaint was issued respondent had entered into 1,535 of such or similar contracts. The parties it contracted with were called "District Agents." These so-called District Agents sold the publications issued by respondent at wholesale to distributors and at retail to others. They wholesaled to school boys, among others, and were given supervision over a schoolboy selling organization of respondent.

Of these 1,535 so-called District Agents, 1,088 of them had not been engaged in handling the magazines or newspapers of other publishers at the time respondent contracted with them, many of them having been recruited direct from respondent's school-boy selling organization. *The Commission's order did not apply to them, for the Commission did not hold as unfair or as substantially lessening competition the use by respondent of said contract with those who were not at the time engaged in handling the periodicals of other publishers.* The Commission's order did not affect the boy salesmen nor disturb their relations with the Curtis Company.

Of respondent's 1,535 so-called District Agents, 447 of them were at the time respondent contracted with them, engaged in the wholesale and general

distribution or sale of magazines or newspapers of other publishers, *and were in most instances the principal and most efficient, and in numerous cases, the only mediums for the distribution of such publications in the various localities of the United States.* The Commission's order directed respondent to cease and desist from entering into contracts with such general wholesale distributors, and to refrain from enforcing the said contract provision in the case of the said 447 general wholesale distributors above referred to.

The Circuit Court of Appeals reversed the order based upon the Commission's findings, made other and further findings from the testimony, and held: (1st) That the contract of the respondent with its distributors was not a contract of sale, but was a contract of agency, and was therefore not within the purview of the Clayton Act; and (2d) that the charge of unfair methods of competition made by the Commission against respondent under the Federal Trade Act could not be "legally adjudged."

ASSIGNMENTS OF ERROR.

It is urged that the petition for certiorari should be granted because the Court erred:

1. In holding that the contract of the respondent with its distributors, is a contract of agency and not a contract of sale, contrary to the decision of the United States Supreme Court in the case of Dr. Miles Medical Company *v.* Park & Sons Company, in 220 U. S. 373; and contrary to the decision of the United

States District Court for the Southern District of New York in the case of Pictorial Review Company *v.* Curtis Publishing Company, 255 Fed. Rep. 206, which involved practically the identical contract.

2. In holding as a justification for respondent's contract that respondent's competitors may find other channels through which to distribute their magazines than those they had been using and which respondent's contracts closed to them, notwithstanding the fact that the Commission's findings, supported by testimony, and accepted by the Court in its opinion as established, recite "that such established channels are in most instances the principal and most efficient and in numerous cases the only mediums for the distribution of such publications in the various localities of the United States," and notwithstanding the fact that the same Court, in the case of United States *v.* Keystone Watch Case Company, 218 Fed. Rep. 502, 512, held a precisely similar provision in a contract to be "*pro tanto* a direct and unlawful restraint of trade." The Court further held in that case:

> "It is not sufficient to answer that these competitors appear to have withstood the attack with more or less success, and that their total trade did not always, or even often, diminish" (p. 512).

3. In holding as a justification for respondent's contract with its distributors that Clause 13 thereof did not prevent or hinder the retailer from getting the publications of other publishers through the

American News Company; notwithstanding the fact that the respondent itself abandoned the American News Company because it was not an efficient distributor. The Court held in effect that since the Curtis Company allowed its competitors free access to an inefficient agency, it was justified in preventing them from having access to all the efficient agencies in the United States. The Court overlooked the fact, too, that respondent might contract with the American News Company at any time and close even that agency to its competitors. This holding of the Court conflicts with its decision in United States *v.* Keystone Watch Case Company, *supra*.

4. In holding that there is no proof in this record that any harm has been done in the past by the business methods followed by the Curtis Company, and that there is no proof that commerce has in any way been throttled thereby; notwithstanding the fact that the findings of the Commission, supported by testimony, and accepted by the Court in its opinion as established, are directly to the contrary; and notwithstanding the decision of the same Court in United States *v.* Keystone Watch Case Company, *supra*, which virtually held that precisely similar business methods constituted a direct and unlawful restraint of trade, regardless of the proofs in the case; and notwithstanding the decision of the Circuit Court of Appeals for the First Circuit in Standard Fashion Company *v.* Magrane Houston Company, 259 Fed. 793, 796,

where the Court held, in quoting Judge Trieber in another case on the subject of the competition prohibited by the Clayton Act:

> "Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing, but to make it unlawful for any person to do these acts, which may put it in his power to do so."

5. In disregarding that portion of Section 5 of the Federal Trade Act which provides that "The findings of the Commission as to the facts, if supported by testimony, shall be conclusive," and in making additional findings, some of which are contradictory to certain of such findings, though the Court in its opinion specifically accepted the Commission's findings as established.

6. In misconstruing the unfair method of competition prohibited by the Commission's order and, on such misconstruction, reversing such order. The Court apparently assumed that the Commission prohibited the respondent from using its contracts in all cases and accordingly made findings of its own which it considered relevant and necessary in view of that assumption. It is respectfully maintained that such additional findings did not, in view of the actual unfair method of competition prohibited by the order, justify a modification thereof, much less a reversal of the same. Such additional findings recited at great length the history, purpose, and work of the respondent's school-boy selling organization, and expressed the view that the Com-

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mission's order enjoined respondent from successfully conducting its distributing and selling agency, and that by reason of such order respondent's competitors would disrupt and destroy such agency. The Commission's order, if made effective, would not, we maintain, affect such school-boy selling organization in the slightest degree.

7. In quoting a certain extract from the opinion of the United States District Court in Pictorial Review Company *v.* Curtis Publishing Company, 255 Fed. 209, pertaining to the respondent's school-boy selling organization, and in holding that the facts reported in that case nowise contraverted the fact-findings of the Commission and that the Court in that case, and the Commission in the case at bar, reached anomalous and contradictory legal conclusions upon the same general facts; and in holding that the proofs in the case at bar are not such as can support a judgment or decree of unfair competition on the part of the Curtis Company toward the Pictorial Company and the Crowell Company; thereby indicating that the Court erroneously regarded the issues involved in the two cases as identical. In the Pictorial case, the issue was whether or not the complainant could avail itself of the Curtis Company's school-boy selling organization. In the instant case the issue is entirely different, namely, can respondent lawfully *make a practice* of preventing by contract the principal and most efficient distributors of the magazines of other publishers throughout the United States, from handling such other publications.

8. In holding that the deposit made by the distributor under his contract with respondent was merely "an indemnity to secure payment for all copies the agent does not return"; notwithstanding the fact that the contract specifically provides that the deposit is held by respondent as cash security for the distributor's obligation, among others, to *sell* a specified number of respondent's publications.

9. In holding that the charge of unfair method of competition made by the Commission in its complaint against respondent was not sustained by the record and proofs in the case; notwithstanding the fact that the findings of the Commission, supported by testimony, and accepted by the Court in its opinion as established, are directly to the contrary.

10. In holding that Congress by the Federal Trade Act gave to the United States Circuit Courts of Appeal the same jurisdiction and power to review the proceedings of the Federal Trade Commission as is exercised by such Courts in reviewing cases coming under its general jurisdiction; notwithstanding the fact that Section 5 of said Act provides that "the findings of the Commission as to the facts, if supported by testimony, shall be conclusive." Section 5 provides for the "narrow" review only.

11. In setting aside the order of the Commission directed against the respondent herein.

Wherefore it is respectfully submitted that the writ should issue as prayed.

William L. Frierson,
Solicitor General.

Adrien F. Busick,
Acting Chief Counsel for Federal Trade Commission.

BRIEF.

I.

THE CONTRACT IS A CONTRACT OF SALE.

The Court, in its opinion dwelt at length upon certain provisions of respondent's contract with its distributors, but did not discuss Clause 8 thereof whereby the distributor obligates himself to sell, and consequently to buy, a certain prescribed number of magazines. Clause 7 of the contract compels the distributor to deposit a sum of money which is held by the respondent under Clause 16 to insure the faithful performance of that and other obligations. Clause 8 therefore brands the contract unmistakably as a contract of sale, no matter how skillfully the balance of the contract is disguised, for the distributor unreservedly contracts to buy respondent's magazines.

The United States District Court in Pictorial Review Company *v.* Curtis Publishing Company, *supra*, construed practically the identical contract which the court in this case held in its opinion to be an agency contract, as follows:

> "I can have no doubt that the district agents or wholesalers who receive from the defendant the Ladies' Home Journal and put it on the market are *purchasers* of the magazine. There can be no question in view of the payment in advance and the other elements of the transaction, that *title* to the magazines which these wholesale agents receive *passes* to them. They are not mere factors or agents."

The respondent used one form of contract up to the time the Commission's charges were filed against it, which it changed at that time because, we believe, of the characterization given it as a contract of sale in the opinion just quoted, and because, presumably, it wished to avoid the prohibitions of the Clayton Act governing certain contracts of sale. The new contract, however, is clearly a contract of sale, for the respondent makes the distributor *guarantee* by Clause 9 to sell a certain number of its magazines. He deposits money under Clause 13 with the respondent which is held by the latter to insure the faithful performance by the distributor of his obligations and *guarantees*. The only *guarantee* he makes is to sell a specified number of magazines. The distributor contracts to buy respondent's magazines, notwithstanding the added disguises which the contract of sale contains in its present form.

The order of the Commission is directed at both contracts. Both are in force at the present time, though presumably the contracts now being entered into are of the new form.

The United States District Court's view of practically this same contract is given in the Pictorial Review Company case just referred to, as follows:

> "If nothing but a sale were involved, I might support complainant's contention that defendant has violated the Clayton Act by preventing its wholesale dealers from selling the Pictorial Review through subdealers and boys," (p. 208–9).

In that case, the complainant was attempting to secure the use of the Curtis Company's school-boy selling organization which is a matter not involved in this case. The Court in this case interpreted the Commission's findings and order as directed against such organization, too, and consequently followed the decision in the Pictorial Review Company case.

COMPETITION IS SUBSTANTIALLY LESSENED.

The Commission regards respondent's contract with its distributors as an absolute contract of sale, and if it is, the contract is unlawful under section 3 of the Clayton Act wherever the effect of its use *may be* to substantially lessen competition or tend to create a monopoly.

The Circuit Court of Appeals for the First Circuit on the subject of the Clayton Act in Standard Fashion Company *v.* Magrane Houston Company, 259 Fed. 793, 796, quoting from Judge Trieber in U. S. *v.* United Shoe Machinery Company, 234 Fed. 127, 150, said:

> "Evidently Congress was not satisfied to only prohibit actual lessening of competition or monopolizing, but to make it unlawful for any person to do these acts which may put it in his power to do so."

The Court further said with reference to the act:

> "Competition, actual or potential, was the object of the congressional solicitude" (p. 797).

In the same case, before the United States District Court, 254 Fed. 493, 499, the Court said:

> "By the use of the word 'may' the intent is manifest to deal with the potential evil which a contract may contain, and to make the attempt to substantially lessen competition unlawful."

Aside from these constructions of the Clayton Law which were not adopted by the Court in the case at bar, the Commission's findings, supported by testimony, and which are therefore conclusive, and which the Court in its opinion accepted as established, recited that the respondent's contract prevented its competitors from utilizing distributors who were in most instances the principal and most efficient, and in numerous instances, the only mediums for the distribution of magazines of other publishers in the various localities throughout the United States. The effect of the contract here, *when entered into with distributors already engaged in handling magazines or newspapers of other publishers,* must be to substantially lessen competition as found by the Commission, and the testimony is that respondent actually intended it to have that effect. The Commission, it must be borne in mind, did not hold that the contract necessarily may tend to substantially lessen competition except in the cases above mentioned, namely, where the distributors are already handling some of the other 400 publications in the United States.

The Court in reversing the Commission's order, reached a decision quite at variance with its decision in United States *v.* Keystone Watch Case Company, 218 Fed. 502, where it held a precisely similar provision in a contract to be "*pro tanto* a direct and

unlawful restraint of trade" (p. 512). It further held:

> "It is not sufficient to answer that these competitors appear to have withstood the attack with more or less success, and that their total trade did not always, or even often, diminish" (p. 512).

II.

THE UNFAIR METHOD OF COMPETITION.

It is respectfully maintained that the Court in reversing the Commission's order, did so upon a misconstruction of the unfair method of competition which the order prohibited.

The Court's view of what was prohibited is summed up in its opinion in these words:

> "Is it evidence of unfair business in magazine publishing to have an exclusive distributing agent?"

That being the question which the Court thought was before it, it answered its own question in the negative by reversing the Commission's order, just as the Commission would have handled the matter had that been the question before it. But that was not the question before the Commission or the Court. The question was whether or not respondent used an unfair method of competition by making a practice of entering into contracts with wholesale dealers already engaged in selling the newspapers or magazines of other publishers whereby such dealers are prevented from thereafter selling the periodicals of such other publishers, such dealers having been the principal and most efficient and in numerous cases

the only mediums for the distribution of the periodicals of such other publishers.

The Court took the view that the Commission's order prohibited the use of respondent's contract in all cases, though the order admits of no such construction. Respondent's distributors who had not been engaged in handling the periodicals of other publishers at the time respondent contracted with them, including all of the respondent's schoolboy organization, are not affected by the order.

The Commission maintains that when respondent through its contract makes a practice of closing to its competitors the established channels for the distribution of magazines which they have been using, the respondent is using an unfair method of competition, and if allowed to continue, respondent might take away from its competitors all of the efficient mediums of wholesale magazine distribution in the United States and secure unto itself the exclusive use of all of them.

As was aptly said by the Court with reference to a precisely similar contract provision in Standard Fashion Co. *v.* Magrane Houston Co., 254 Fed. 493, 498:

> "If the plaintiff could make a contract like the one under consideration with all the proprietors of retail dry goods stores in this district it would have a complete monopoly of the sale of patterns in it, and there is nothing in the contract to prevent it doing this, or even concerning the whole state of Massachusetts or the whole country. If there

> were but one dry goods store in a village, and the plaintiff could make this contract with the proprietor of that store, it would secure a practical monopoly of the pattern business in that village."

The Commission's order allows respondent to use all of its present distributors, provided that the 447 who were already engaged in selling the magazines of other publishers when respondent contracted with them, be allowed to resume selling them; or respondent may secure new distributors to take their places who are not engaged in handling other publishers' periodicals, just as it has done in the case of 1,088 of its distributors. These new distributors would then be made respondent's exclusive so-called District Agents who would sell its publications to dealers and to respondent's school-boy selling organization, just as the 1,088 District Agents are now doing. The respondent's school-boy selling organization consequently would not be disturbed in the slightest degree. This is said in answer to the claim advanced by the Court in its opinion that the respondent's school-boy selling organization would be disrupted if the Commission's order were made effective. The District Agents do not control the respondent's boy organizations. The respondent alone does that, and changes its District Agents at will and, when changing them, gives the new District Agents charge over the respondent's school boys in their respective territories. The order of the Commission actually preserved to respondent the complete and exclusive use of its school-boy selling organization.

The Court dwelt at length upon the testimony introduced by respondent bearing upon the work done by and for respondent's schoolboy selling organization and the attempt of a competitor in the case of Pictorial Review Company *v.* Curtis Publishing Company, 255 Fed. 206, to utilize those boys, all of which clearly indicated that the Court erroneously regarded the Commission's order as directed against such organization, and that the Court regarded the issue in this case as identical to the issue in the Pictorial case.

The Court's view of the case is clearly shown in the following excerpts from its opinion:

> "It is to be noted as an evidence of business morality among the magazine publishers, that but two of the four hundred magazine publishers made any effort to take away from the Curtis Company the undivided services of its distributing agents."

That statement was made by the Court in the early part of its opinion. Standing alone it would seem to show the respondent as having been subjected to a grievous wrong at the hands of the Commission. In the latter part of the Court's opinion, the reason the other publishers did not complain is revealed by the Court in these words:

> "While the restrictive wording of the contract was broad in scope and *covered all magazines and all publishers*, yet in its practical enforcement it was only enforced against these *two* competitive firms."

In other words, the only competitors who had cause for grievance were those against whom the Curtis Company decided to enforce its contract! As a matter of fact, the Curtis Company enforced the contract against every publisher which it regarded as a competitor, that is to say, every competitor of the Saturday Evening Post, the Ladies Home Journal, and the Country Gentleman. The great majority of the 400 other publishers in the United States have not yet been regarded by the respondent as its competitors. Any time it decides that a publication, present or prospective, is or will be a competitor, the Court's decision allows it to invoke its contract and prevent that competitor from utilizing all the established channels for the distribution of his magazines.

If the Commission's order were not made effective in this case, any large and dominant publisher could close to its competitors every wholesale magazine and newspaper distributing channel in the United States and hold such channels for its own exclusive use, just as respondent may do and has started to do in this case. It could thus destroy or seriously interfere with all of its competitors who had incurred great expense in securing these channels for the distribution of their publications.

III.

THE COURT'S FINDINGS.

Section 5 of the Federal Trade Act provides that the Commission "shall state its findings as to the facts." The same section also provides that the Circuit Court of Appeals "shall have jurisdiction of

the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree modifying or setting aside the *order* of the Commission. *The findings of the Commission as to the facts, if supported by testimony, shall be conclusive.*" It will be noted that this last clause, which makes the Commission's findings conclusive, immediately follows the clause which defines the jurisdiction of the Court. The Commission is made the sole fact-finding body by the Act. There is no provision giving the Circuit Court of Appeals jurisdiction to find facts from the testimony before the Commission. As Justice Brandeis said in the dissenting opinion in Federal Trade Commission *v.* Gratz, 253 U. S. 421, 436–7:

> Recognizing that the question whether a method of competitive practice was unfair would ordinarily depend upon special facts, Congress imposed upon the commission the duty of finding the facts.

If the Court desired further findings as to the facts from the 3,400 pages of testimony in the case, it is respectfully maintained that it should have remanded the case to the Commission for such further findings. The Supreme Court of the United States has uniformly returned cases to the Court of Claims for further findings. In United States *v.* Adams, 76 U. S. (9 Wall.) 661, 663, the Court said:

> We can not give the Court of Claims any directions as to what findings it shall make, or

how it shall proceed to make up its finding on the points in question.

This same practice was followed in United States *v.* Ripley, 220 U. S. 491.

The Circuit Court of Appeals in its opinion in the case at bar accepted the findings of the Commission as established, but thereupon proceeded to make numerous additional findings of its own. A large number of such findings were contradictory to certain findings of the Commission supported by testimony, and which were therefore conclusive, and which were, moreover, as above stated, accepted by the Court as established. If the Court had the power to make additional and contradictory findings of fact, it would have power to make complete findings in lieu of the Commission's findings. It might then on its own findings reverse the Commission's order, at the same time leaving the Commission's findings intact.

The Commission respectfully maintains that the Court exceeded its jurisdiction in making such additional findings, and in making such contradictory findings.

CONCLUSION.

The decree of the Circuit Court of Appeals, it is respectfully maintained, should be reversed.

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